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BRIEF OF APPELLEE.

Filed Jan. 19, 1899.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

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SIOUX CITY TERMINAL RAILROAD & WAREHOUSE COMPANY, CREDITS COMMUTATION COMPANY, E. H. HUBBARD, Trustee, and E. H. HUBBARD, Assignee of the UNION LOAN & TRUST COMPANY, *Appellants*,

vs.

THE TRUST COMPANY OF NORTH AMERICA, *Appellee*.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

ASA F. CALL, Sioux City, Iowa,
JOSEPH H. CALL, Los Angeles, California,
Solicitors and Counsel for Appellee.

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CREDITS COMMUTATION COMPANY,
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vs.
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STATEMENT OF THE CASE.

As Appellants' statement is incomplete and in some respects inaccurate, we make a brief statement of facts disclosed by the record.

This suit was brought by the Appellee to foreclose a mortgage for $1,250,000.00 given by the Sioux City Terminal Railroad & Warehouse Company on the 1st day of January, 1890, covering properties in Sioux City, Woodbury County, Iowa, known as the Terminal properties, consisting of about a mile

and a quarter of railroad in the heart of the city, and certain lots and blocks on which were situated passenger station, freight depots, elevators, warehouses, etc.

In the trial court this suit was consolidated with a suit brought by the First National Bank of Montpelier, and other banks, beneficiaries, to foreclose a second mortgage give by the same Company, covering the same property, which was executed on the 24th day of April, 1893, securing notes or bonds to the amount of $750,000.00. The consolidated causes were then tried as one suit.

The Sioux City Terminal Railroad & Warehouse Company was incorporated on the 16th day of September, 1889, by filing Articles of Incorporation under the general incorporation laws of Iowa, which provide, Section 1607:

> "Any number of persons may become incorporated for the transaction of any lawful business, but such incorporation confers no power or privilege not possessed by natural persons, except as hereinafter provided."

Section 1609:

> "Among the powers of such corporations are the following:
>
> 1. To have perpetual succession;
> 2. To sue and be sued by its corporate name;
> 3. To have a common seal, which it may alter at pleasure;
> 4. To render the interests of the stockholders transferable;
> 5. To exempt the private property of its members from liability for corporate debts, except as otherwise declared;
> 6. To make contracts, acquire and transfer property—possessing the same powers in such respects as natural persons;
> 7. To establish by-laws, and make all rules and regulations necessary for the management of its affairs."

The objects of the corporation as stated by its Articles were:

> "Article III. This Company shall have power to construct, operate and maintain one or more lines of railway within the corporate limits of Sioux City, Iowa, with all needed sidetracks, depots, yards, warehouses, storage houses, elevators, and all other needed terminal facilities, and shall have power to acquire by purchase or condemnation all needed grounds for right of way, depot purposes and sidetracks, wood and water stations, and to hold, use and control the same, and shall have power to construct, operate and control one or more lines of railway from the depot and yards of the said Company in Sioux City, one to run in an easterly direction to the eastern line of Woodbury County, Iowa, one to run in a westerly direction to the Big Sioux River, and one in a northerly direction to the Iowa State line, and shall have power to lease grounds and buildings, to purchase and hold all needed grounds for the use and purpose of said Company, and to mortgage, lease or sell the said grounds and improvements thereon."

The authorized capital stock of the corporation, provided in its orginal Articles, was $1,000,000.00.

The Sioux City & Northern Railroad Company was the only stockholder in this corporation, and on the 14th day of December, 1889, the Terminal Company made a lease of all its property and franchises to the Sioux City & Northern Railroad Company, for a period of one hundred years, providing in the lease that out of the rental the sum of seventy-five thousand dollars ($75,000.00) should be paid directly by the Railroad Company to this trustee, to be named in a mortgage of $1,250,000.00, the mortgage in suit being then in contemplation.

In addition to this warrant of authority from the only stockholder, there was a meeting of the stockholders of the Terminal Company expressly authorizing the mortgage in suit, and being also authorized by a resolution of the board of

directors, the mortgage was executed on the 1st day of January, 1890, and the trust was formally accepted after the trustee had submitted the matter to able counsel, and had been advised that all proceedings leading up to the issuance of the mortgage were regular and in due form of law.

The bonds secured by the mortgage, amounting to $1,250,000.00, were sold upon the open market to good faith purchasers, for cash, the lowest price received being ninety cents on the dollar.

The moneys derived from the sale of the bonds were forwarded by the appellee to the Union Loan & Trust Company of Sioux City, Iowa, and deposited to the account of the Terminal Company, and all such moneys were used by the Terminal Company in the acquisition of property, the improvement of the same, and the liquidation of its obligations incurred in the purchase and improvement of its properties.

This mortgage was recorded with the Recorder of Deeds of Woodbury County, Iowa, on the 27th day of February, 1890.

The interest upon the bonds secured by this mortgage was regularly paid until the 1st day of January, 1894, through the payment of rentals by the Sioux City & Northern Railroad Company under its hundred year lease.

Some time after the execution of this first mortgage and the sale of the bonds thereunder, the Terminal Company became indebted to various persons and institutions for borrowed money, and on the 24th day of April, 1893, in contemplation of its own insolvency and the insolvency of the various firms and corporations with which it was associated, it made a second mortgage to the Union Loan & Trust Company to secure its floating debt, then amounting to $718,000.00, providing in said mortgage:

> "And the said party of the first part hereby covenants that the said premises are free from all encum-

brance excepting a deed of trust made on the 1st day of January, 1890, by the said party of the first part to the Trust Company of North America of Philadelphia, to secure the sum of $1,250,000.00 of bonds. And the said party of the first part will warrant and defend the title unto the said party of the second part, its successors and assigns, against all persons whomsoever lawfully claiming the same, subject to the lien of the said prior deed of trust."

On the 10th day of October, 1893, the First National Bank of Montpelier, and others, beneficiaries under this second mortgage, filed their bill of complaint in the Circuit Court, asking foreclosure of its mortgage, alleging a default in interest, payment of taxes, etc., and asking the appointment of a receiver, under which an order was made appointing a receiver, who, under this appointment, still holds possession of the Terminal Company properties.

On the 17th day of April, 1894, the Trust Company of North America, Trustee, filed its bill of complaint to foreclose the first mortgage because of default in the interest payable on the 1st day of January, 1894, making the maker of the mortgage, the second mortgagee, and various mechanics' lien holders parties defendant.

On the 29th day of September, 1894, the Terminal Company and the beneficiaries under the second mortgage filed their answer, which was amended on the 16th day of October, 1894.

In the meantime the general creditors of these various institutions had incorporated themselves into a company called the Credits Commutation Company, which thereby became the owner of the floating debt of the Terminal Company secured by the second mortgage, and on the 23d day of July, 1895, the Credits Commutation Company took a general judgment against the Terminal Company on the floating debt, in the State Court of Iowa, waiving the mortgage security, and

with leave of court, on the 12th day of August, 1895, the Credits Commutation Company filed its petition of intervention in this suit, claiming on its judgment in the State Court against the Terminal Company, attacking the validity of the first mortgage.

In the meantime, on the 23d day of December, 1893, the Terminal Company, having passed into the control of the representatives of the creditors under the second mortgage, executed a third mortgage or deed of trust to E. H. Hubbard, Trustee, as additional security to the creditors under the second mortgage, covering and embracing all of the property of the Terminal Company, but omitting the clause that it was made "subject to the first mortgage to the Trust Company of North America." E. H. Hubbard, Trustee, having been made a defendant in the foreclosure suit of the first mortgage, joined with the Terminal Company in answering, denying the validity of the first mortgage.

From this statement it will be observed that the subsequent creditors of the Terminal Company present themselves in these various attitudes of attack on the first mortgage: first, as representing the Terminal Company; second, as beneficiaries under the second mortgage; third, as beneficiaries under the third mortgage; fourth, as the Credits Commutation Company holding all the obligations as a general judgment creditor.

In these various defenses many points were made, most of which have been either abandoned or eliminated. The chief reliance now for attack on the validity of the mortgage is based upon a statute of Iowa relative to corporations, providing as follows:

> "Section 1611. Such articles must fix the highest amount of indebtedness or liability to which the corporation is at any one time to be subject, which in no case, except risks of insurance companies, and liabili-

ties of banks not in excess of their available assets, not including their capital, shall exceed two-thirds of its capital stock. But the provisions of this section shall not apply to the bonds or other railway or street railway securities, issued or guaranteed by railway or street railway companies of the state, in aid of the location, construction and equipment of railways or street railways, to an amount not exceeding sixteen thousand dollars per mile of single track, standard gauge, or eight thousand dollars per mile of single track, narrow gauge, lines of road for each mile of railway or street railway actually constructed and equipped. Nor shall the provisions of this section apply to the debentures or bonds of any company incorporated under the provisions of this chapter, the payment of which shall be secured by an actual transfer of real estate securities for the benefit and protection of purchasers thereof; such securities to be at least equal in amount to the par value of such bonds or debentures, and to be first liens upon unincumbered real estate worth at least twice the amount loaned thereon."

The orginal Articles of Incorporation of the Terminal Company in evidence disclose the fact that the capital stock therein provided was $1,000,000.00, and the mortgage being in excess of that amount, it is claimed that the corporation had no power to make it, and it is, therefore, void.

Evidence was not taken on the question as to whether the corporation afterward amended its Articles and increased its capital stock, and the record does not disclose whether such a step was taken. Under the laws of Iowa the corporation had power to so amend. Code, Section 1615, provides:

"Changes in any of the provisions of the Articles may be made at any annual meeting of the stockholders, or special meeting called for that purpose, and they shall be valid only when recorded, approved and published as the original Articles are required to be. Such changes, however, need only be signed and acknowledged by such officers of the corporation as may be designated to perform such act by the stockholders."

Under this state of facts a decree of foreclosure was entered by the Circuit Court on the ground that the mortgage was not within the prohibition of the statute of Iowa.

On appeal to the United States Circuit Court of Appeals for the Eighth Circuit this judgment was affirmed on the ground that the giving of the mortgage was not a void act under the statute of Iowa under the interpretation that had been placed upon it by the Supreme Court of that state, and that therefore the doctrine of estoppel was applicable and should be applied.

A writ of certiorari was sued out from this court, and, presumably, the entire case stands for review.

FIRST QUESTION.

THE FIRST QUESTION TO DECIDE IS WHETHER THE MORTGAGE IN CONTROVERSY IS ABSOLUTELY VOID BEING CONTRARY TO PUBLIC POLICY OR BEYOND THE POWER OF THE CORPORATION TO MAKE IT, OR WHETHER IT IS ONLY VOIDABLE FOR THE IRREGULAR EXERCISE OF GENERAL POWERS GRANTED.

If we read the decisions of this court aright there are two well defined, clearly spoken lines of decision, one of which holds that if a contract is absolutely void equity will not enforce it and the doctrine of estoppel cannot be invoked to give it life.

Pullman's Car Co. vs. Transp. Co., 171 U. S., 138, 149.
California National Bank vs. Kennedy, 167 U. S., 362.
McCormick vs. Market Bank, 165 U. S., 539.
Cent. Transp. Co. vs. Pullman's Co., 139 U. S., 24, 60.
Thomas vs. Railroad Co., 101 U. S., 71.

The other equally strong and equally well considered line of authority holds that an irregular exercise of a general power by a corporation cannot be taken advantage of by one who has received and continues to hold the benefits of the contract, and that in all cases where the contract is not absolutely void the doctrines of estoppel are fully applicable.

Bank vs. Matthews, 98 U. S., 621, 629.
Fritts vs. Palmer, 132 U. S., 282, 292.
Logan County Bank vs. Townsend, 139 U. S., 67, 76.
Thompson vs. St. Nicholas Bank, 146 U. S., 240, 251.

FIRST POINT.

WHETHER THIS MORTGAGE IS VOID DEPENDS UPON A PROPER CONSTRUCTION OF THE STATUTES OF IOWA.

In determining whether this mortgage is void it should be constantly borne in mind that there is no constitutional question, no question of general public policy, no abandonment of a public duty, no moral turpitude, no element of fraud, deceit or other evil involved. The sole and only question is whether the legislature of Iowa gave power to this corporation to make this mortgage. It is entirely a matter of statutory construction. The state of Iowa as a sovereign state has an inherent right to frame its own policy regarding the corporations it creates so long as that policy does not contravene the broader public policy of the general government which has been declared.

Such power is an attribute of sovereignty. It flows from the power to create. A creator must have the power to fash-

ion his own creation, as this court has said in effect in many noted cases.

In Bank United States vs. Dandridge, 12 Wheat., 64, it is said:

> "Whatever may be the implied powers of aggregate corporations by the common law, and the modes by which these powers are to be carried into operation, corporations created by statute must depend for their powers and the mode of exercising them upon the true construction of the statute itself."

In Bank of Augusta vs. Earle, 13 Peters, 519, it is said:

> "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence."

> "The power to create corporations was, in England, vested in the sovereign, to whose powers each of the States of the Union succeeded upon their emancipation from British domination. This sovereign right may, therefore, be exercised by the several States, except so far as their constitutions prohibit, or as may be incompatible with the powers delegated by them to the federal government." 1st Beach Corp., Sec. 2.

This court has repeatedly declared that it can interpret but it cannot make a public policy for the United States or for any State.

License Tax Cases, 5 Wall., 462, 469.

This court can only look to the statute itself and the decisions of the court of last resort in Iowa construing it in determining the validity of the mortgage.

SECOND POINT.

THE INTENTION OF THE LEGISLATURE OF IOWA CAN BE GATHERED FROM THE LANGUAGE OF THE STATUTE

The familiar doctrine of this court that "all contracts made by a corporation beyond the scope of its powers are unlawful and void" can have no application here, for corporations in Iowa are granted the power to borrow money and give mortgage to secure it. The only question is as to the effect of borrowing too much.

It will be conceded that the Terminal Company had the power to borrow $666,000.00, or two-thirds of its capital stock, and give a mortgage upon certain of its property to secure it. The question is raised over the excess.

In construing this statute, we ask the court to consider what is omitted as well as what is declared, as was done in the National Bank cases, where this court laid stress upon the thought that the absence of any provision making the act complained of void was tantamount to a declaration that it should not be held to be void.

In the statute under consideration there is no provision that the excessive debt should be void and uncollectible. Not being declared, there is no presumption it was intended. The power to create debt being general, the limitation to be effective should be specific.

If any doubt of the legislative intent were left it should be dispelled by a subsequent act of the legislature which in effect declares the result to be that not only the corporation but its individual members should be liable for the excessive debt.

> Section 1622. " * * * * If the indebtedness of any corporation shall exceed the amount of indebtedness permitted by law, the directors and officers of such corporation knowingly consenting thereto shall be personally and individually liable to the creditors of such corporation for such excess."

THIRD POINT.

THE EFFECT OF THIS STATUTE HAS BEEN SEVERAL TIMES CONSTRUED BY THE SUPREME COURT OF IOWA, AND SUCH CONSTRUCTION SHOULD BE BINDING ON THIS COURT.

The principle is well settled that the decisions of the highest court of a state construing the laws of the state upon which are based mortgages, bonds, corporate powers and rights of property generally, are binding upon the Federal Courts, and constitute a rule of property.

Chicago Railroad vs. Minnesota, 134 U. S., 418, 456.
Union Bk. of Chicago vs. Kan. Bk., 136 U. S., 223, 235.
Etheridge vs. Sperry, 139 U. S., 266, 277.
In Re Duncan, 139 U. S., 449, 462.
Sage vs. Louisiana, 144 U. S., 647, 650.
Morley vs. Lake Shore Railway, 146 U. S., 162, 166.
Bier vs. McGehee, 148 U. S., 137, 142.

The effect of this statute on the validity of this mortgage in a suit between the same parties and relating to the same subject matter has recently been determined by the Supreme Court of Iowa in favor of the validity of the mortgage.

Beach vs. Wakefield, 76 Northwestern Rep., 688 (see also appendix), in which the court said, page 694:

> "A distinction is to be taken between contracts like this and those which, independent of statute, are in violation of public policy. The creation of this indebtedness involved no moral turpitude. The making of the mortgage did not disable the corporation from performing its duties to the public. The Terminal Company had a right to incur a debt and to execute a mortgage to secure it. The only ground of complaint is that it went further than the law permitted. Of this the state may complain, but the Terminal Company cannot, nor can any person whose rights are acquired through the Terminal Company, and who acquired such rights with knowledge of the mortgage lien."

Again it is said on page 695:

> "We are aware that the security has been held invalid, and a right of recovery thereon denied in many cases where an action has been permitted upon the common counts. But we think these cases will be found to involve contracts which were absolutely void, and not, as in the case at bar, voidable only. This distinction is clearly preserved in the cases."

This decision is in line with the previous decisions of the Supreme Court of Iowa.

In Garrett vs. Burlington Plow Company, 70 Iowa, 697, 702, the court say:

> "It is averred that the directors unlawfully contracted indebtedness of the corporation in excess of the limit prescribed by its articles of incorporation. But this has nothing to do with the directors' claim in controversy. As we have before said, they may be liable to proper parties for their negligence or unlawful acts, but honest contracts made with them are not defeated thereby. Our views above expressed are in harmony with the familiar rules of the law, and are supported by the following decisions of this court: Buell vs. Buckingham, 16 Iowa, 284; Farmers' & Merchants' Bank of Lineville vs. Wasson, 48 Iowa, 336; Hallam & Indianola Hotel Co., 56 Iowa, 178. Decisions of other courts, which need not be cited, are to the same effect."

In Warfield vs. Marshall County Canning Company, 72 Iowa, 666, 672, the court says:

> "The proposition is stated by counsel, but it is not, we think, insisted upon, that the mortgage is ultra vires, because the articles of incorporation provide 'that it shall be competent to mortgage the property of the company to the amount of not exceeding one-half of the capital stock actually paid in.' This question was determined adversely to appellant in Garrett vs. Plow Company, before cited."

In Garrett vs. Plow Company the authorized capital stock of the defendant company was $50,000.00, of which $25,000.00

only was subscribed. The unsecured debts amounted to $21,400.00, at which time the company made a mortgage to secure additional indebtedness in the sum of about $24,000.00, and the Supreme Court of Iowa decided that this mortgage was valid.

In Warfield vs. Canning Company the capital stock of the Canning Company was $6,000.00, and a mortgage upon the entire property of the Company for $10,000.00 was held to be valid.

The construction which the Supreme Court of Iowa has thus uniformly given to this law necessarily entered into and became a part of the contract between the holder of this mortgage and the bondholders which it secured and the corporation.

There is a vested right in the bondholders to these bonds based upon the laws of Iowa as construed by the Supreme Court of that State before the bonds were executed.

FOURTH POINT.

THIS MORTGAGE WAS NOT ULTRA VIRES THE CORPORATION BECAUSE, UNDER THE LAWS OF IOWA, THE CORPORATION HAD THE POWER TO SO AMEND ITS ARTICLES AS TO MAKE IT UNQUESTIONABLY GOOD, AND, THEREFORE, EQUITY WILL SAY IT IS GOOD.

Under the statute quoted granting power to corporations in Iowa to amend their articles, it has been held by the Supreme Court of Iowa that the corporation had the right to amend its articles by increasing its authorized capital stock, thereby validating the previous excessive indebtedness.

Humphreys vs. Patrons' Association, 50 Iowa, 607, 609, in which the court says:

"It does not clearly appear whether notice of the amended articles was published, but no question of that kind is presented in this court, and none appears to have been raised in the court below. The amended articles were recorded, but not until after the transaction in question. It is urged, therefore, by the appellant, that they were not in force at the time of the transaction in question. In support of this view our attention is called to Section 1065 of the Code, which provides that no change shall be made in the articles of incorporation 'unless recorded as the original articles are required to be.' But it appears to us that this provision was made for the protection of those with whom the corporation might deal. Such persons might, doubtless, in a proper case, set up the fact that the amended articles were not recorded. But, where the corporation has assumed to make a contract authorized by the amended articles, and has received the consideration, we do not think it can be allowed to escape the obligation of the contract by setting up a want of record of the amended articles. * * * * The amended articles provide that the company's indebtedness shall be limited to $2,000.00. The fact, however, is that at the time of the transaction in question the company had purchased goods on credit to the amount of $3,000.00, and they had not been paid for. Now it is contended that, if the company had the power to incur indebtedness for goods, it had already incurred as much indebtedness as was authorized, and could not incur any more. * * * * * In our opinion, however, the limit imposed by the amended articles upon the company's power to contract indebtedness would not necessarily have the effect to exempt the company from liability for indebtedness assumed to be contracted in excess of the limit. It has been held, it is true, that a municipal corporation is not liable for indebtedness assumed to be contracted in excess of the limit fixed by the constitution. Carter vs. City of Dubuque, 35 Iowa, 416. But we know of no case where a private corporation has not been held, at least to the extent of the consideration received, for indebtedness assumed to be contracted in excess of the limit imposed

> by the articles of incorporation. There is good reason for making a distinction between municipal and private corporations in this respect."

The limit of the statute as to capital stock means authorized capital stock, and not paid up capital stock. See

> Trust Co. vs. Columbus Ry. Co., 87 Fed. Rep., 816, 828.

There was no impediment to calling a meeting of the corporation and increasing the authorized capital stock to $2,000,000.00, either before or after the mortgage was given. Under the laws of Iowa the corporation could have done it. Code, Section 1615. (See appendix.) As to whether it in fact did do it the record is silent. The mortgage contained a recital as follows:

> "And whereas, the Sioux City Terminal Railroad & Warehouse Company has full power and authority, under the laws of the state of Iowa, to create this present issue of bonds, and to secure the same by a mortgage upon all the property, leases and franchises." (Record, p. 142.)

And the bonds themselves contained a recital as follows:

> "This bond is one of a series of bonds not exceeding in the aggregate $1,250,000.00, and is secured by a mortgage or deed of trust duly made and delivered by said Company to the Trust Company of North America, Trustee, for the holders of all of said bonds, which said mortgage is the first lien upon the real estate and improvements of the said Terminal Railroad & Warehouse Company, with all the appurtenances and improvements thereon, or to be placed and erected thereon, and all leases, rights, privileges and franchises held by this Company." (Record, p. 144.)

Mr. John Cadwalader, President of the Trust Company testified:

> "Prior to accepting the trust we had all matters which were necessary to the ascertainment of the fact

that the trust deed was a first encumbrance upon a good and clear title, and that the Company making it was fully competent in law to create such an obligation, examined by able counsel whose opinion was given to us in writing. Upon this advice we alone acted." (Record, p. 135, 136.)

Upon these representations the bonds were all sold upon the open market at ninety to ninety-five cents on the dollar, and the moneys paid to the Terminal Company. (Record, p. 125, 129.)

On these facts and this record our position is that the Terminal Company having the power, under the statute of Iowa, to make this mortgage unquestionably good by amending its articles, having recited in the mortgage and bonds that it was good, and having induced large investments upon these representations, it is now and should be estopped from saying that it did not do what it should have done. The plainest principles of equity and good conscience require this rule to be applied.

The case presented is entirely different from that where the law expressly forbids the creation of a debt, as in Scoville vs. Thayer, 105 U. S., 143. In the one case the act is forbidden by the law, and nothing that the corporation can do can make the act valid, while in the other case the corporation is authorized to incur an indebtedness in any amount if the corporation itself, by its stockholders or board of directors, takes certain preliminary steps.

In the Hackensack Water Company vs. Minna De Kay, 36 N. J. Equity, 548, the charter authorized the company to increase its capital to $100,000.00, and to borrow money not exceeding two-thirds of its capital. $2,000.00 of the capital was paid in. A motion was adopted to increase the capital to $100,000.00, but no certificate was filed, and the stock was not

taken. Notwithstanding the fact that the capital was not paid in a mortgage of $66,500.00 was upheld.

On page 568 the court say:

> "In all the external circumstances—competent legislative authority, an orginization de facto, directors and officers de facto, the corporate seal affixed, with the secretary's oath that it was legally affixed—the transaction was perfectly legal. These are the matters which persons dealing in corporate securities are bound to take notice of. The imperfection arose from the omission of acts which the directors should have done in the management of the private business of the company. Those are the matters with respect to which third persons are not obliged to be informed. Finding the power to make the mortgage in the charter, and that the power might be made complete on certain conditions to be performed by the corporation in the management of its internal affairs, third persons would be justified in assuming that such conditions had been complied with, and that everything had been done by the corporation or its directors which was necessary to validate the securities before they were put in circulation. As against a bona fide holder, who has taken upon the faith that the security is what it appears to be, a corporation cannot defend on the ground of such omissions on its part or by its directors."

Central Trust Company vs. Columbus Railway Company, 87 Federal, 816, to foreclose railway bonds amounting to $8,000,000.00 under a statute providing that a corporation might borrow money not exceeding the amount of its capital stock. It was held that a mortgage by a corporation in excess of its capital stock was not void as against a subsequent mortgagee with notice, if upheld by the corporation and its stockholders.

On page 828 it is said:

> "This limitation as to third persons must be regarded as applying to the authorized, and not the subscribed stock."

And also on the same page it is said:

> "The execution of the mortgage was within the general scope of the powers of the corporation, and this objection is only that it is in excess of the limitations imposed upon the exercise of that power. The statute does not declare that indebtedness in excess of capital stock shall be null and void. The corporation and every shareholder consented, and will not, therefore, be heard to complain. The transaction was not on its face immoral, and involved no turpitude. The objection comes from subsequent creditors, who, with knowledge that the indebtedness thus secured was in excess of the authorized capital stock, voluntarily added to that excess, and now seek to sweep out of the way a prior assumption of liability that they may profit by it. Such subsequent creditors stand in the shoes of the mortgagor, and if it could not object, they cannot. For such violation of the limits imposed by law upon the power of the Company to create an indebtedness, the state alone should be heard to complain. The cases holding valid mortgages taken by national banks to secure loans made at the time are in point."

Farmers Loan & Trust Company vs. Toledo Railway Co., 67 Federal Reporter, 49. Under a statute providing that a railroad may borrow money and mortgage its property to an amount not exceeding the amount of the capital stock of the company, and also under a statute providing that a company may increase its capital stock whenever, in the opinion of the directors, the same is insufficient for the construction of its road, etc. The company had issued a sufficient amount of stock to cover the amount of its bonded debt, but the stock had been irregularly issued. It was held that the stockholders were estopped from showing the irregularity. On page 58 the court say:

> "We do not think that the decision of the Supreme Court in Nesbit vs. Riverside Independent Dist., 144 U. S., 610, and kindred cases, in which bonds were held invalid when issued in excess of an absolute limit fixed by statute, as, for example, a percentage of the taxable value of property in a county, have application to a

> case of this sort, where it is plainly within the power of the corporation, by properly increasing its stock, to issue bonds equal in amount to the increase, and where an increase is attempted, and the only defect is an irregularity in the method by which the increase is sought to be made, rather than in a total want of power to secure it."

In Bishop vs. Kent & Stanley Co., 41 Atlantic Reptr., 255, it was held that stockholders may not question a mortgage executed by a corporation in violation of a charter provision that no mortgage shall be made without consent of three-fourths of the stockholders.

On page 257 it is said:

> "We think it is very clear in the first place that the mortgage in question is not void, but at most is only voidable. The making thereof was unquestionably an act within the scope of the corporate powers of the defendant company, although the power to give the mortgage was not exercised in accord with the charter."

In Bank vs. Mining Company, 89 Federal Repr., 440, under a New York statute which authorized the mortgage of realty by a corporation, but requiring the written consent of the stockholders owning at least two-thirds of the stock to be filed with the clerk of the county where the realty was situated, a mortgage of the corporation was upheld, though the assent was not manifested in the statutory way.

On page 446 the court say:

> "Counsel for defendant, in support of his position that contracts made by officers of a corporation without authority cannot be approved by the corporation directly or by implication, cites Central Transportation Company vs. Pullman's Palace Car Company, 139 U. S., 24, and similar cases. The fact that by so many decisions that court has announced an apparently contrary rule should serve as a suggestion to counsel of a distinction in the cases, which is simply that when an

officer, or the corporation itself, attempts to make a contract which is not within the powers of the corporation, which is absolutely contrary to law, it is not merely voidable but void, and cannot be ratified or approved; but when it is one that may be made by the corporation, but is made by an officer without due authority, or when he has not fully complied with the form of the law or the rules of the corporation, when his act is merely tainted with some irregularity, and not repugnant to law, it is only voidable, and may be affirmed or become binding, as before stated."

FIFTH POINT.

THE STATUTE OF IOWA PROHIBITS THE MAKING OF SUCH DEFENSES AS ARE URGED IN THIS CASE.

Section 1636 of the Code of Iowa provides:

> "No person or persons acting as a corporation shall be permitted to set up the want of a legal organization as a defense to an action against them as a corporation, nor shall any person sued on a contract made with such an acting corporation, or sued for an injury to its property, or a wrong done to its interest, be permitted to set up a want of such legal organization in his defense."

This provision was in force when the bonds and mortgage in question were executed, and had been carried in the statutes of Iowa since 1851.

This statute not only prohibits the corporation from disputing its want of legal organization, but also forbids any person contracting with the corporation to set up a want of such legal organization.

In the cases above cited in the Supreme Court of Iowa, that court doubtless took into consideration the provisions of

this section, and they have in many previous cases rigidly enforced its provisions.

Washington College vs. Drake, 14 Iowa, 14.

Franklin vs. Twogood, 18 Iowa, 515.

Howe Machine Co. vs. Snow, 32 Iowa, 433.

This statute of Iowa seems to have been borrowed from the statutes of Kentucky. The same section was construed by this court in the case of Handley vs. Stutz, 139 U. S., 418, 426, in which this court held that the prohibition against questioning the "want of legal organization" extends to and includes amendments to the charter which the company may be authorized to make.

In that case it was claimed that the stock issued by the Clifton Coal Company, a corporation of Kentucky, in excess of a certain amount, was unauthorized, and that purchasers of such unauthorized issue were not liable therefor.

The law of Kentucky, like the law of Iowa, authorized the corporation to amend its articles of incorporation, and under that act the corporation had the power to amend its articles by increasing the amount of its capital stock. It appears that the corporation took some preliminary steps towards amending its articles to increase the authorized capital, but did not publish notice of such amendment, or record it as required by the laws of that state. It was held that the failure to do so did not make the stock so issued void, and that the purchaser was estopped from disputing its validity, and was liable thereon.

The difference between the Handley case and the case at bar is this: in the case at bar the corporation had issued negotiable bonds to third parties, who purchased in good faith and for value, thereby holding out to such purchasers that everything had been done which the corporation was required

or authorized to do to make those bonds valid, including, if necessary, an amendment to its articles of incorporation; while in Handley vs. Stutz the corporation had not put out any negotiable securities, but had issued stock which was not fully paid for, after having taken preliminary steps to amend its articles, but not having in fact amended them as provided by the laws of Kentucky.

In both cases the act would have been entirely regular and unquestionable if the corporation had performed certain formal acts which the law expressly authorized it to perform.

And, therefore, it is submitted that the principle in the Handley case is applicable to the case at bar, that the construction of the Kentucky statute is equally applicable to our statute, that under it the corporation is estopped from asserting that it failed to do certain acts which it might have done to make the bonds unquestionable.

SIXTH POINT.

THERE IS NO LAW OF IOWA PROHIBITING THE MAKING OF A MORTGAGE, AND IT CAN BE ENFORCED IF THERE IS ANY DEBT SECURED BY IT.

The statute relied on by Appellants does not prohibit the making of a mortgage. The mortgage is in equity an incident to the debt which it was given to secure. Therefore, if there is a debt which can be enforced in any form of an action it is not an invalid debt, and the mortgage securing it is not an invalid mortgage, and the mortgage may be foreclosed in any appropriate form of action.

The present suit is essentially a suit to foreclose a mortgage. The bonds are incidentally mentioned in the bill of

complaint as an evidence of the debt created. The broader relief asked is an accounting between the parties, and a foreclosure of the mortgage for the amount found to be due.

This mortgage was made in Iowa. Under the laws of Iowa its validity is to be determined by the statutes of Iowa as interpreted by the highest court of the state. That court has said in the case of Beach vs. Wakefield, supra, construing this same mortgage:

> "It is the debt which is prohibited and not the mortgage. So long as the debt in any form can be enforced, the mortgage should stand." 76 N. W. R., 695.

The charter of the Company expressly granted the power to make mortgages in any amount. (Art. 13; record, p. 191.)

The record in this case discloses the fact that the Trust Company of North America, Appellant, sent to the Terminal Company the proceeds of the bonds, amounting to ninety per cent. on the first million sold, and ninety-five per cent. on the last two hundred and fifty thousand sold, or a total amount of $1,137,500.00. (Record, pp. 89, 91, 100, 120, 127.) This was the debt which the mortgage was given to secure regardless of whether that debt was evidenced by bonds or not, or whether the bonds were valid or not; and even if the bonds were held invalid, and the contract inhering therein unenforceable, yet if there is a debt of $1,137,500.00 which can be enforced by action on quantum meruit, this mortgage is valid as securing that debt, and, under the broader prayer of the bill in this suit, an accounting may be had, and the mortgage foreclosed for the amount found due.

Pullman's Car Co. vs. Transp. Co., 171 U. S., 138.

SEVENTH POINT.

A PROPER CASE TO APPLY THE DOCTRINE OF ESTOPPEL.

In determining the merit of this case it seems to us that it is important to continually bear in mind the distinction between a contract which may be ultra vires the board of directors, and one which is ultra vires the corporation.

The corporation may do many acts which the board of directors could not, for the very simple reason that the corporation has greater power to validate its acts, and, therefore, has corresponding power to estop itself from questioning the validity of its acts.

In this case the corporation itself has done every possible act in the direction of estoppel. The sole and only stockholder, the Sioux City & Northern Railroad Company, authorized the making of the mortgage; it accepted a lease of all the property for one hundred years which contained a provision reciting this mortgage; it paid interest on the mortgage for three years in the guise of rental under the lease.

The board of directors authorized the mortgage, the mortgage itself recited that all acts had been done to make the mortgage valid, the proceeds of the loan were received by the mortgagor and used in the enhancement of its properties.

Not only is this true, but the creditors who question the validity of the mortgage are also estopped to an equal degree, for they hold no debt, no claim and no equity antecedent to the mortgage. All the obligations which they hold were made over two years after the mortgage was executed. The second mortgage which they first held contained an express provision that it was made subject to the first mortgage. All of their claims were acquired while the first mortgage was on record in the place where the law required it to be recorded. Therefore, if it is possible in any case to apply the doctrine of es-

toppel to the plea of invalidity of such a mortgage, it should be applied in this case, for here we have a combination of all the elements of estoppel.

Every principle of fair dealing and common honesty requires that this mortgage should be enforced against the property. The principle of estoppel should be applied unless there is some inexorable rule of law which forbids it.

Upon the broader principle this court has said in Graves vs. Saline County, 161 U. S., 359, at page 374:

> "It may be fairly said that, while a municipal corporation may not ratify a contract into which it had no power to enter, and may not waive a condition put by the legislature upon the exercise of a given power, yet it may well waive a condition made by itself and not a condition upon the exercise of the power."

The general rule is that where the abstract power exists but formal steps to its exercise have not been observed the estoppel will be applied where benefits have been received and retained.

> Bank vs. Whitney, 103 U. S., 99.
> Thompson vs. Bank, 146 U. S., 240, 251.
> Handley vs. Stutz, 139 U. S., 417 422.

The corporate capacity as to questions like this cannot be raised collaterally or otherwise than by direct proceedings:

> Cowell vs. Springs Company, 100 U. S., 55, 61.
> Fritts vs. Palmer, 132 U. S., 282, 293.

And the estoppel is applied with great force in cases like the one at bar where the securities contain recitals upon their face that they have been executed by authority, and the purchaser is not required to examine other records made by the corporation.

Chaffee vs. Potter, 142 U. S., 355.
Citizens vs. Perry County, 156 U. S., 692.
Andees vs. Ely, 158 U. S., 313, 324.
Evansville vs. Dennet, 161 U. S., 434.

The case falls within the principle established in
Chubbs vs. Upton, 95 U. S., 665.
Veeder vs. Hudgett, 95 N. Y., 295, 310.
Handley vs. Stutz, supra.

In the latter case the court, quoting with approval from the case of Veeder vs. Hudgett, say:

> "But where, as in the present case, the abstract power did exist, and there was a way in which the increase could lawfully be made, and the creditors could, without fault, believe that the increase had been lawfully effected, and the necessary steps had been taken, there the doctrine of estoppel may apply, and the increased stock be deemed valid as against the creditors who have acted upon the faith of such increase."

EIGHTH POINT.

THE MORTGAGE IS NOT ULTRA VIRES THE CHARTER.

It was suggested by counsel for appellants that the mortgage might be considered ultra vires the charter and not ultra vires the statute, on the theory that the charter could not be broader than the statute but might be narrower, and in this case sufficiently narrow to forbid the mortgage.

To this proposition the argument already made applies with great force, that a statute of Iowa enabled the corporation to amend its charter at any meeting, and good faith creditors had a right to rely on the corporation doing whatever lay in its power to do to make the mortgage valid.

But in point of fact it cannot be said that the charter is narrower than the statute, for the provision in the charter provided in terms that mortgages upon its real estate were excluded from its limitations. Record, p. 191, Article 13, which provides:

> "The highest amount of indebtedness which this Company shall at any one time subject itself shall not exceed two-thirds of the paid up capital stock of the said Company, aside from the indebtedness secured by mortgage upon the real estate of the Company."

It is evident that this article was framed on the view expressed by Judge Shiras in his opinion foreclosing this mortgage, that the statute of Iowa limiting the debt of corporations excepted from its provisions those debts which were secured by mortgage on real estate.

In our view this question is settled by the Supreme Court of the State adversely to this position in the case of Beach vs. Wakefield above cited, construing this same mortgage, it being there held that the exception of the statue refers only to debenture companies and not to mortgages directly upon real estate.

In view of this holding the article in question could not have the effect of broadening the power, and yet, with this proviso in the article, it cannot fairly be said that the article, and thereby the charter, is narrower than the statute. For, so far as the charter is concerned, the exception leaves it without limitations as to mortgages on real estate.

On the broader question of ultra vires, however, it is immaterial whether it be considered narrower or as broad as the statute. Under either the statute or the charter the corporation had power to create a debt and give a mortgage to secure it, and, therefore, neither a debt nor a mortgage can be considered as absolutely null and void, and if not absolutely null and void, equity will enforce both the debt and the mortgage.

NINTH POINT.

WHAT OTHER COURTS HAVE SAID ABOUT IT.

While, perhaps, this court may not have construed a law or a charter of this character, yet other courts of high character and reputation have had occasion to construe them, and, so far as we know, have uniformly held that where there was power to create some debt, an excessive debt would not be held void, but would be enforced if equity was called upon to apply the doctrine of estoppel.

The following cases are believed to be directly in point construing either statutes or charters similar in phraseology:

Wood vs. Corry Water Works, 44 Fed. Rep., 147.
Poole vs. West Point Assn., 30 Fed. Rep., 520.
Hackensack Co. vs. De Kay, 36 N. J. Eq., 548, 568.
Trust Co. vs. Ry., 87 Fed. Rep., 816, 828.
Farmers & Trust Co. vs. Ry. Co., 67 Fed. Rep., 49, 58.
Bishop vs. Kent, 41 Atlantic Rep., 255.
Bank vs. Mining Co., 89 Fed. Rep., 440, 446.

In conclusion, we desire to say that whatever may be the general view of this court as to the enforcibility of void contracts, and whatever it may believe the true construction of the Iowa statute should have been as an original proposition, this contract should not now be disturbed.

For, prior to the execution of the contract, the highest court of the State had given it its sanction.

The contract was executed on the faith of that construction.

That the faith was well planted is shown by the recent decision of that court ratifying this contract.

The whole fabric of commercial transactions requires such recognition of the powers of the State as will enable men

to do business on the faith of its laws as construed by its highest courts on questions of internal policy.

The underlying principles of our government, the powers reserved in the compact of the States, the just recognition of the right of the highest court of a State to construe its laws are involved in the determination of this suit.

Equity, good conscience and a sound public policy require the upholding of this contract and the affirmance of the United States Circuit Court of Appeals.

Respectfully submitted.

ASA F. CALL,
JOSEPH H. CALL,
Counsel for Appellee.

APPENDIX.

DATES OF MATERIAL TRANSACTIONS.

Sept. 16, 1889. Organization of the Sioux City Terminal R. R. & Warehouse Company. (Record, p. 191.)

Dec. 14, 1889. Transfer of all its stock by "Ter. Co." to the S. C. & Northern R. R. Co., in consideration of franchises. (Record, p. 197.)

Dec. 14, 1889. Lease to S. C. & N. R. R. Co. of all property of Terminal Co. for 100 years. (Record, p. 199.)

Dec. 14, 1889. Meetings of Stockholders and Directors authorizing the mortgage to the Trust Co. of North America. (Record, p. 210.)

Jan. 1, 1890. Mortgage to the Trust Co. of North America. (Record, pp. 140 to 157.)

Oct. 1, 1892 to

May 1, 1893. Floating debt of Terminal Co. incurred. (Record, pp. 78 to 82.)

Apr. 24, 1893. Second mortgage of Terminal Co. to secure its floating debt. (Record, p. 15.)

Oct. 10, 1893. Suit to foreclose second mortgage asking appointment of Receiver. (Record, p. 5.)

Dec. 23, 1893. Sioux City Terminal R. R. & Warehouse Co. executes a third mortgage to secure floating debt. (Record, p. 233.)

Apr. 17, 1894. Trust Co. of North America commenced suit to foreclose the first mortgage. (Record, p. 24.)

June 20, 1894. Order of Circuit Court consolidating the two foreclosure suits. (Record, p. 248.)

July 23, 1895. Judgment in State Court in favor of Credits Commutation Co., owner of floating debt, vs. Terminal Co., waiving mortgages. (Record, p. 83.)

Aug. 12, 1895. Intervention by Credits Commutation Co., owner of general judgment. (Record, p. 65.)

Oct. 5, 1895. Circuit Court renders decree in consolidated causes sustaining first mortgage. (Record, p. 254.)

Aug. 2, 1897. Opinion filed by U. S. Circuit Court of Appeals, affirming Circuit Court. (Record, p. 288.)

Dec. 20, 1897. Writ of Certiorari.

STATUTES OF IOWA RELIED UPON.

Reference being to Code of 1897, which states beneath each section the date of original enactment.

Section 1607. WHO MAY INCORPORATE. Any number of persons may become incorporated for the transaction of any lawful business, but such incorporation confers no power or privilege not possessed by natural persons, except as hereinafter provided.

Section 1609. POWERS. Among the powers of such corporations are the following:

1. To have perpetual succession;
2. To sue and be sued by its corporate name;
3. To have a common seal, which it may alter at pleasure;
4. To render the interests of the stockholders transferable;
5. To exempt the private property of its members from liability for corporate debts, except as otherwise declared;
6. To make contracts, acquire and transfer property—possessing the same powers in such respects as natural persons;
7. To establish by-laws, and make all rules and regulations necessary for the management of its affairs.

Section 1611. LIMIT OF INDEBTEDNESS. Such articles must fix the highest amount of indebtedness or liability

to which the corporation is at any one time to be subject, which in no case, except risks of insurance companies, and liabilities of banks not in excess of their available assets, not including their capital, shall exceed two-thirds of its capital stock. But the provisions of this section shall not apply to the bonds or other railway or street railway securities, issued or guaranteed by railway or street railway companies of the state, in aid of the location, construction and equipment of railways or street railways, to an amount not exceeding sixteen thousand dollars per mile of single track, narrow gauge, or eight thousand dollars per mile of single track, narrow gauge, lines of road for each mile of railway or street railway actually constructed and equipped. Nor shall the provisions of this section apply to the debentures or bonds of any company incorporated under the provisions of this chapter, the payment of which shall be secured by an actual transfer of real estate securities for the benefit and protection of purchasers thereof; such securities to be at least equal in amount to the par value of such bonds or debentures, and to be first liens upon unincumbered real estate worth at least twice the amount loaned thereon.

Section 1615. CHANGE OF ARTICLES. Changes in any of the provisions of the articles may be made at any annual meeting of the stockholders or special meeting called for that purpose, and they shall be valid only when recorded, approved and published as the original articles are required to be. Such changes, however, need only be signed and acknowledged by such officers of the corporation as may be designated to perform such act by the stockholders.

Section 1622. FORFEITURE. Any intentional violation by the board of directors or the managing officers of the corporation of the provisions of the two preceding sections shall work a forfeiture of the corporate privileges, to be enforced as provided by law. If the indebtedness of any corpo-

ration shall exceed the amount of indebtedness permitted by law the directors and officers of such corporation knowingly consenting thereto shall be personally and individually liable to the creditors of such corporation for such excess.

Section 1636. ESTOPPEL. No person or persons acting as a corporation shall be permitted to set up the want of a legal organization as a defense to an action against them as a corporation, nor shall any person sued on a contract made with such an acting corporation, or sued for an injury to its property, or a wrong done to its interests, be permitted to set up a want of such legal organization in his defense.

Section 2041. BONDS—MORTGAGES. Any such corporation may issue its bonds for the construction and equipment of its railway in sums of not less than fifty dollars, payable to bearer or otherwise, with interest not exceeding eight per cent. per annum, and making them convertible into stock, and sell the same at such prices as is thought proper. If such bonds are sold below par they shall, nevertheless, be valid, and no plea of usury shall be allowed in any action or proceeding brought to enforce the collection thereof. Such corporation may also secure the payment of the bonds by mortgages or deeds of trust upon the whole or any part of its property and franchises.

Section 2042. AFTER-ACQUIRED PROPERTY. Such mortgages or deeds of trust may by their terms include and cover not only the property of the corporation making them, owned at the time of their date, but all property, real and personal, which may thereafter be acquired, and they shall be as valid and effectual for that purpose as if the property was in possession at the time of their execution.

Section 2049. BONDS SECURED BY MORTGAGE. Any railway corporation organized under the laws of the state may mortgage its property and franchises, in whole or

in part, to secure bonds issued by it to pay or refund its indebtedness, to improve or develop its property, or for the purpose of effecting the object of its incorporation, to be issued in such amounts, run for such length of time, be payable within or without this state, and bear such rate of interest, not to exceed the legal rate in the state at the time of issue, as the company issuing the same shall determine.

OPINION OF THE SUPREME COURT OF IOWA.

IN THE SUPREME COURT OF IOWA.

FILED OCTOBER 11, 1898.

S. J. BEACH AND CHARLES L. WELD, PARTNERS UNDER THE FIRM NAME OF BEACH & WELD, *Appellee*,

vs.

E. C. WAKEFIELD, ET AL., *Appellee*, WARWICK HOUGH, RECEIVER OF THE SIOUX CITY TERMINAL RAILROAD AND WAREHOUSE COMPANY, *Appellant*,

AND

THE TRUST COMPANY OF NORTH AMERICA, *Appellant, et al.*

APPEAL FROM WOODBURY DISTRICT COURT.

HON. F. R. GAYNOR, Judge.

* * * * * The Credits Commutation Company, E. H. Hubbard, as assignee, as a grantee in trust of the Terminal Company, and as assignee of the Union Loan and Trust Company, files a cross petition in which he attacks the validity of the mortgage made to the Trust Company of North America, on various grounds which will be mentioned hereafter.

The Union Loan & Trust Company was a second mortgagee of the Terminal property, holding by express stipulation subject to the mortgage of the Trust Company of North America. The Credits Commutation Company was the holder of a considerable floating indebtedness of the Terminal Company.

No foreclosure of either of the mortgages is sought in this action. As a matter of fact, foreclosure proceedings under

the mortgage of the Trust Company of North America are pending in the Federal Court, and the Credits Commutation Company, the Terminal Company and the Union Loan and Trust Company are parties thereto, and have set up there the same matters they are now urging here. That case has been tried in the Federal Circuit Court and in Circuit Court of Appeals, and in both instances the holding was in favor of the validity and priority of the mortgage of the Trust Company of North America. All that is asked in this case by the cross petitioners who complain is that their claims be declared valid and that the first mortgage be held invalid. We might with propriety leave these matters for settlement by the tribunal that has jurisdiction of the foreclosure, were it not for the fact that Wakefield urges the same claim in his behalf. As we permit the Trust Company to question Wakefield's settlement with Garretson, only on the ground of its interest in the Terminal property, it becomes necessary when that interest is denied, to determine whether the Trust Company has a mortgage.

5. It is contended that the mortgage is void, first, because the Terminal Company had no legal right or power to make a mortgage; and in this connection we may also consider the claims made, that it had not the power to mortgage its franchise or to give a lien on after acquired property.

The Terminal Company was, as already said, a railroad company. That it was something more we readily concede, but it was nothing less. Being such, it had the power expressly given in section 1965, McClain's Code, to mortgage its property including its franchise. Sec. 1966 of said Code gives express authority to mortgage after acquired property, and, we may add, that when the power to mortgage exists, the right to incumber after acquired property is necessarily included. Such a mortgage is valid in equity by way of estoppel

on the mortgagor and all persons claiming under him, whether voluntarily or otherwise.

Mitchell vs. Winslow, 2 Story's Rep., 630.
Christy vs. Dana, 34 Cal., 548.
Pennock vs. Coe, 23 How., 117.
1 Jones on Mort's., 152, and cases cited.

6. It is next urged that the mortgage in question is invalid, because the debt it secures is in excess of the amount of indebtedness which the Terminal Company was legally empowered to incur. The capital stock of the company was $1,000,000. We take it that it is only the excess over two-thirds of this sum that can be questioned.

Section 1061, Code of 1873, limits the amount of indebtedness of corporations formed for pecuniary profit to two-thirds of the capital stock. By the 20th G. A., ch. 22, this section was amended by adding the following proviso:

"Provided, That the provisions of this section shall not apply to the bonds or other railway securities to be hereafter issued or guaranteed by railway companies of this State, in aid of the location, construction and equipment of railways, to the amount of not exceeding sixteen thousand dollars per mile of single track, narrow gauge, lines of road for each mile of railway actually constructed and equipped."

The 21st G. A., chapter 57, added another proviso in these words:

"Provided, further, That the provisions of this section shall not apply to the debentures or bonds of any company, duly incorporated under the provisions of this chapter, the payment of which debentures or bonds shall be secured by an actual transfer of real estate securities for the benefit and protection of purchasers of said debentures or bonds, such securities to be at least equal in amount to the par value of such bonds or debentures, and to be first liens upon unencumbered real estate worth at least twice the amount loaned thereon."

The amount of indebtedness here is largely in excess of two-thirds of the amount of the capital stock, but it is thought by counsel for the Terminal Company that the transaction falls within the terms of the last proviso quoted, and that the indebtedness is therefore sanctioned by law. This was the holding of the Federal Circuit Court on the first trial of the foreclosure proceedings. Bank vs. Terminal Company, 69 Fed. Rep., 441.

We are inclined to think the property mortgaged was, at the time the indebtedness was incurred and the mortgage executed, worth double the amount of the debt, and we cannot agree that a mortgage given by a debtor corporation on its own property was intended to be covered by this proviso. It is a matter of public knowledge, that within a comparatively late period, many companies engaged in the business of making loans on real estate security, have adopted a method of procuring funds to invest, by which they issue their own bonds or debentures which are placed in the hands of a trustee for sale, and which are secured by real estate mortgages, taken by such companies for other loans which they have made. For something on this subject, see: Cook on Stockholders, Sec. 777.

At about the time of the enactment of this amendment companies were operating extensively in Iowa on this system. The amount of indebtedness, where this manner of business was carefully and honestly done, could not under ordinary circumstances prejudice any person interested in the corporation; and we can see good reason for taking such companies out from under the restriction of the original section. We think this proviso applies to a class and not to a condition. That it singles out this particular kind of corporation and is not meant to point out a state of affairs which it was thought might exist with any corporation.

7. The indebtedness for which this mortgage was given, being in excess of the amount fixed by law, it remains to be seen whether complainants have any standing to attack the validity of the transaction. The rights of all these cross petitioners accrued subsequent to the making and recording of this mortgage. While Wakefield's lien, in part is given priority over the mortgage, his contract was made and his work was done after the mortgage was made and with full notice of it. The other complainants are the holders of an indebtedness, that was incurred also in violation of the statute. The Terminal Company, which joins in the attack, has received and still retains the benefit of the funds obtained on this mortgage.

The Circuit Court of Appeals, on appeal from the Federal Circuit Court, of the case between these parties, and which may be found in 82 Fed. Rep., 124, affirmed the lower court but rested its holding upon the ground that complainants could not be heard to assert the invalidity of the Trust Company's mortgage.

The general rule, as stated in Twiss vs. Guaranty Life Ass'n., 87 Iowa, 733 (737), is that "where an ultra vires contract is made and performed on one side, the other party cannot be permitted to enjoy the benefits received, but will be required in a proper action to account; in other words the doctrine of a want of power to contract cannot be invoked to aid a party to perpetrate a wrong and injustice." To like effect are the cases of. Garrett vs. Plow Co., 70 id., 697; Warfield vs. Canning Co., 72 id., 666; Humphreys vs. Patrons Ass'n, 50 id., 607.

In Sedg. Stat. & Const. Law, 73, it is said: "When it is a simple question of authority to contract, arising either on a question of irregularity of organization or of power conferred by its charter, a party who has had the benefit of the

agreement, cannot be permitted in an action founded upon it, to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains." This language is quoted with approval in Township of Pine Grove vs. Talcott, 19 Wall., 666, and also in Bank vs. Matthews, 98 U. S. S. C., 621. In Poole vs. Butter & Cheese Ass'n, 30 Fed. Rep., 513, the same doctrine was applied to a case where the contract made was in excess of an express statutory grant of power. So, too, in Fritts vs. Palmer, 132 U. S. S. C., 282; Bank vs. Matthews, supra., and Manchester Ry. Co. vs. Concord Ry. Co. (N. H.), 20 Atl. Rep., 383. In this last case the following statement of the law by a learned text writer is approved: "If an agreement is legally void and unenforceable by reason of some statutory or common law prohibition, either party to the agreement who has received anything from the other party, and has failed to perform the agreement on his part, must account to the latter for what he has received. Under these circumstances the courts will grant relief irrespective of the invalid agreement, unless it involves some positive immorality or there are other reasons of public policy why the courts should refuse to grant relief in the case." See, also, on this subject: Wood vs. Corry W. Works, 44 Fed., 146; Central Trust Co. vs. Railway Co., 23 Fed., 306; Planters Bank vs. Union Bank, 16 Wall., 483; Gold M. Co. vs. Bank, 96 U. S., 640; White vs. Bank, 22 Pick., 181; Whitney vs. Peay, 24 Ark., 22; Whitney Arms Co. vs. Barlow, 63 N. Y., 62; McCarthy vs. Lavasche, 89 Ills., 270; Prairie Lodge vs. Smith, 58 Miss., 301; Oil Creek Co. vs. Transportation Co., 83 Pa. St., 160; Baptist Church vs. Baptist Church, 73 N. Y., 82; Central Trust Co. vs. Railway Co., 23 Fed. Rep., 306; Campbell vs. Aryenta Co., 51 Fed., 1.

A distinction is to be taken between contracts like this and those which independent of statute are in violation of public policy. The creation of this indebtedness involved no

moral turpitude. The making of the mortgage did not disable the corporation from performing its duties to the public. The Terminal Company had a right to incur a debt and execute a mortgage to secure it. The only ground of complaint is that it went farther than the law permitted. Of this the state may complain, but the Terminal Company cannot, nor can any person whose rights are derived through the Terminal Company and who acquired such rights with knowledge of the mortgage lien. Oil Tank Co. vs. Trans. Co., supra; Union Water Co. vs. Fluming Co., 22 Cal., 620.

It will not do to say that the lien should be held invalid, but that the Trust Company may have an action for its debt as for money had and received. Such a right is of no value now. The Terminal Company should make restitution before it has standing to complain. It is not enough for it to say that it is insolvent and cannot repay what it has received, but that it will submit to an action on the part of the Trust Company.

We are aware that the security has been held invalid and a right of recovery thereon denied in many cases where an action has been permitted upon the common counts. But we think these cases will be found to involve contracts which were absolutely void, and not, as in the case at bar, voidable only. This distinction is clearly preserved in the cases.

In Garrett vs. Plow Co., supra, the indebtedness exceeded the charter limit of the corporation, and the creditors had notice thereof when the transaction took place; and yet a right of recovery was allowed and the lien of a mortgage upheld. See also: Warfield vs. Canning Co., supra; Jones on Mort., Sec. 127; Morawetz Priv. Copr., 714-716; Allis vs. Jones, 45 Fed., 148, and cases therein cited.

A sound basis appears to exist for this holding. It is the debt which is prohibited and not the mortgage. So long as

the debt in any form can be enforced the mortgage should stand.

8. It is said that the Terminal Company, being a railroad corporation, was quasi public in character, and that the rule stated, which applies to private corporations, should not obtain as against it. It is true that a railroad corporation has a dual character. That in many respects it is of a public nature and that the courts will not enforce against such a corporation a contract which will disable it from performing its duties to the government or the people.

Transp. Co. vs. Pullman P. C. Co., 139 U. S., 24.

But we repeat that this mortgage has no such effect. On the other hand, a railroad company is in many respects a purely private corporation. It is organized in this state, under the same section of the Code which provides for the incorporation of all other companies for pecuniary profit. The restriction as to indebtedness applies to all corporations organized under this section. Under ordinary circumstances, we see no reason for distinguishing between them. It is said, further, that the plea of estoppel can be urged only in favor of the innocent, and that the bondholders here are not of that class, for they are held to notice of the corporate power of the Terminal Company. This rule has been applied in cases where the act done was wholly void because of an absolute want of power to sustain it, and in cases where considerations of public policy intervened. Here, as repeatedly said, the act is voidable only; the statute does not even impose a penalty therefor. The purpose of the law is to protect stockholders against the acts of reckless or dishonest officials of the corporation. In the present instance the stockholders of the Terminal Company are in no wise injured, for, so far as the record discloses, they had the benefit of all the money raised on this mortgage. There is no demand of public policy that this

transaction be held invalid. Many of the cases cited above, in which it is held that the plea of estoppel will lie, are similar to the case at bar in this, that upon its face the act done was in excess of the charter power.

See also on this point:

Matt vs. R. C. M. P., Sec. 70 Iowa, 455.
Wright vs. Pipe Line Co., 101 Pa. St., 204.
Witter vs. G. R. Mill Co. (Wis.), 47 N. W., 729.
Carson Bank vs. Elevator Co. (Mich.), 51 N. W., 641.
Dewey vs. Ry. (Mich.), 51 N. W., 1063, and cases cited.

In this last case the rule as laid down by Morawetz in his work on corporations (Sec. 684) is stated and adopted. That rule is as follows: "It does not follow, because the exercise of certain corporate powers is prohibited by the common law, any corporate act performed in violation of this prohibition will not be recognized by the law as a corporate act. * * * The prohibition of the common law against the unauthorized exercise of corporate powers is based upon the ground of public policy alone, and the effect of this prohibition should be determined by the requirements of public policy; and after a contract made by a corporation in excess of its powers is wholly performed by either party * * * * it cannot be said to be in the interest of public policy to deny the innocent party relief. * * * * General statutory prohibitions against any corporate act not included in the powers conferred by the charter, do nothing more than declare the common law of prohibition against any exercise of corporate powers, which has not been authorized by the legislature, and the common law rule would prevail."

It will be observed that in this case the doctrine stated is applied against a railway company and in favor of a cred-

itor, who, as cross petitioners say, was charged with notice of its charter power.

We might cite many other cases of like character, but it seems needless. The conclusion we have reached on this point, after an examination of numerous authorities, is that the creditor is to be deemed "innocent" whenever the transaction involves no moral wrong on his part and can be carried out without contravening any requirements of public policy.

The Circuit Court of Appeals, passing upon this issue, in the action between these parties, said:

"Nor is the innocence or ignorance of the creditor essential to the maintenance of his suit to enforce such a contract. * * * * These decisions do not rest upon the principle of estoppel, nor depend upon the creditor's ignorance of the excessive indebtedness. They stand upon the rule, that he who seeks equity must do equity; and upon the principle that he may not at the same time accept the benefits and repudiate the burdens of his contract."

We take this rule to be correct, but we conceive it to be only an indirect assertion of the doctrine of estoppel. All parties who join here in the attack on this mortgage have been benefited by the transaction, for, as we have said, the funds secured thereby were used to improve the property upon which they have their liens, or against which they make their claims.

We think the plea of estoppel is good against the Terminal Company and those claiming under it; but whether we rest the holding in terms upon this ground or upon the general equitable principles stated by the Federal Court the result is the same; the cross petitioners have no standing to object to the bonds or mortgage of the Trust Company.

9. Another point urged against the mortgage is that the instrument as executed was materially different from the form approved by the board of directors of the Terminal Company.

As we have seen, the Terminal Company negotiated the bonds secured by this mortgage and received and appropriated the funds derived from their sale. Under these circumstances it is in no situation now to complain of the terms and conditions of the mortgage. That instrument, if not originally authorized, has been ratified.

Jones on Mort., Sec 127; Hotel Co. vs. Wade, 97 U. S., 13; McCurdy's Appeal, 65 Pa. St., 230; Aurora Soc. vs. Horticultural Soc., 80 Ill., 263.

10. These are the controlling points in the case. Some other questions are discussed by counsel, but we do not deem it necessary that they be specially noticed.

11. Our conclusion upon the whole case is that the Gillette-Herzog Company should have a lien as allowed by the trial court, but that it should rank eleventh in order of priority, as the claims are numbered in the decree; and it should have no personal judgment against Wakefield.

That Wakefield is entitled to a judgment and lien as against the Terminal Company for the sum awarded by the District Court, but that only the amount of $17,475.87, with proportionate interest, should be established as superior to the mortgage of the Trust Company of North America.

With these modifications the decree of the District Court is

AFFIRMED.